DONATIO MORTIS CAUSA OF NEGOTIABLE PAPER.

IN Rolls *v.* Pearce,[1] Vice Chancellor Malins is reported to have said: "The Law seems to be in a very curious state. The result of the authorities appears to be that a gift of a bill of exchange, which is by its very nature payable at a future day, may be a good *donatio mortis causa;* but the gift of a cheque is not valid unless it is presented for payment or paid before the death of the donor. . . . Now, I can really see no reason why, if a bill drawn on a goldsmith would be a good *donatio mortis causa,* a cheque should not be so too."[2]

These remarks of the learned Vice Chancellor are misleading. The fact that the law on questions of *donatio mortis causa* of negotiable instruments is at first sight confusing is due to want of discrimination by the courts. When closely scrutinized, it is believed that every case, save three, can be reconciled with a very simple principle, based, as it seems, on a general rule of law governing commercial paper, but never yet as to this class of cases fully enunciated, either by a court or text writer.

The proposition above quoted of the learned Vice Chancellor, that a bill of exchange may be the subject of a good *donatio mortis causa,* but that a check may not be, unless it is presented for payment and paid before the death of the donor, is not true. The remark, which has gained entrance into many opinions and text books, is no doubt a remnant of the old distinction that a check payable to bearer was not negotiable; for the learned judge immediately after says: "A distinction has, however, been drawn between the case of a bill of exchange and that of a cheque payable to bearer."[3] Indeed, in the very case before him, the Vice Chancellor supported the gift of a check as a *donatio mortis causa,* which was not presented to the bank before the maker's death. And in Clement *v.* Cheesman,[4] the gift of two checks of a third person, owned by the donor, was supported as a valid *donatio mortis causa.* On the other hand, it has been held that the promissory notes made

[1] L. R. 5 Ch. D. 730.
[2] L. R. 5 Ch. D. 733.
[3] L. R. 5 Ch. D. 733.
[4] L. R. 27 Ch. D. 631.

or the bills of exchange drawn by the donor himself are not such a species of property as is capable of a valid *donatio mortis causa.*[1]

The grounds upon which the courts, that have refused to enforce against his estate the donor's own promissory note at the instance of the donee, have put their decisions, are that such a note is simply evidence of the donor's promise; that it is without consideration, and therefore cannot be enforced; and that on grounds of public policy such death bed gifts should be restrained, since by them all the safeguards of the Statutes of Frauds and Wills might be nullified; and with regard to bills of exchange drawn by the donor, it is said that until accepted, they are simply a promise to pay, if the drawee does not.

In these cases, as well as in the case of the donor giving his own check,[2] there is simply a contractual right against the donor's estate. It is not any part of his property that the donor gives to the donee, but simply an obligation against his estate. There is no possession given of any part of that estate, and therefore there is no delivery, which is an element that is considered essential by the consensus of authority. Moreover, the gift, being only of a *chose in action* against the estate, needs the aid of a court to give it effect; and the donee is met at the threshold of litigation against the donor's estate by the equitable plea of want of consideration. If, before the donor's death, the donee should indorse the note, bill or check to a purchaser for value without notice, there can be no doubt that the donor's estate would be liable on it, just as an indorsee for value can enforce against the maker a promissory note given for the accommodation of the payee, and the same would probably be true, if a bill or note were so indorsed after the donor's death. Moreover, if the donor indorse the obligation of a third person to the donee, his estate would be no more liable on such indorsement than it would be on his own bill or note, although the gift of such an obligation, even if it be a check, is a perfectly good *donatio mortis causa.*[3] Both in law and by the true principle, therefore, governing gifts *mortis causa* of negotiable instruments, there is no distinction between the different kinds of negotiable paper, nor, in this regard at least, between such gifts and gifts *inter vivos.*

[1] Parish *v.* Stone, 14 Pick. 198; Raymond *v.* Sellick, 10 Conn. 480; Tate *v.* Hilbert, 2 Ves. Jr. 111; s. c. 4 Bro. C. C. 286; Harris *v.* Clark, 3 Comst. 93.

[2] *In re* Mead, L. R. 15 Ch. D. 651; Second National Bank *v.* Williams, 13 Mich. 282.

[3] Veal *v.* Veal, 27 Beav. 303; Clement *v.* Cheesman, L. R. 27 Ch. D. 631.

The conclusion that the true principle governing these cases is that no obligation can be enforced against the estate of the donor, and thus, if his name is the only one on the paper, the instrument is worthless, is strengthened by the fact that it is now settled law that the donation of a bill or note or check of a third party is perfectly good, even without indorsement, and that the donee can reduce to possession his property, which he has thus acquired by manual transfer, in the name of the administrator or executor of the donor.[1] That the donee can enforce an obligation in the name of the legal owner is not, indeed, peculiar to this class of cases; for the real owner of a *chose in action* can always enforce it in the name of the nominal legal owner, as in the case where one discounts a note, and by mistake the vendor does not indorse it. But these cases conclusively show that the donee gets a perfect equitable title by delivery, and that indorsement is almost a useless formality in gifts *mortis causa* of negotiable paper, since an indorsement would give no rights against the indorser. In other words, these cases show that in this respect also *donatio mortis causa* does not differ at all from that of a gift *inter vivos*.

In short, the principle on which the cases in this branch of the law can be reconciled, seems to be that the donee can keep from the personal representative whatever assets he has, but he cannot diminish the assets that actually come into the hands of the executor or administrator. And this result is reached by applying the doctrine of want of consideration.

With regard to checks drawn by the donor there is of course a further reason for not allowing their validity against his estate, as a check is only an order on a banker, and is therefore revoked by the maker's death; and this is the ground upon which the courts have put these cases.

In those cases where the check is cashed or certified, a bill accepted or paid, or a note paid, before the donor's death, of course the gift is good; since then there is no question of suing the representative of the donor in order to obtain possession of a tangible gift, or of taking away any assets from the executor, because the donee has either the money or the obligation of a third person.[2]

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[1] Veal *v.* Veal, 27 Beav. 303; Duffield *v.* Elwes, 1 Bligh, N. S. 497; Bates *v.* Kempton, 7 Gray, 382.

[2] Bouts *v.* Ellis, 17 Beav. 121; affirmed 4 De G. M. & G. 249.

If, then, these anomalous death bed gifts are to have any validity at all, it would seem to be a sensible rule that one should be allowed to give away whatever is capable of manual delivery, but should not be allowed to charge his estate with obligations to the detriment of his heirs or legatees. It is perfectly possible that one may be willing to give a stated amount of money or property to another, but would never wish to authorize in any way *post mortem* litigation against his estate; and checks, bills and notes given by way of *donatio mortis causa* are given probably always by laymen, in ignorance of their real effect.

There are, however, three cases which cannot be reconciled with this principle,[1] and which seemingly are not to be supported.

The first of these cases came at Trinity Term, 1718, before Sir Joseph Jekyll, Master of the Rolls. The nature of the cause is not disclosed by the report, which simply states that it came on upon the master's report. The facts were that a testator had on his death bed given his wife a purse and a bill on a goldsmith with which to buy her mourning. His Honor had no doubt that the purse, with its contents, was a good *donatio mortis causa;* but as to the bill of exchange, he "at first held that the testator's ordering the goldsmith to pay £100 to his wife was but an authority, and determined by the testator's death."[2] He however reserved his decision until the Hilary Vacation, when he held the bill to be a good *donatio mortis causa* also, on the ground that, being given to the wife for mourning, it was like directions for a funeral, and should be given effect, if possible, since it operated as an appointment.

It seems, therefore, that the learned judge's inclinations got the better of his law.

In Ward *v.* Turner,[3] Lord Hardwicke observes with regard to the bill of exchange in Lawson *v.* Lawson, that he "cannot say on what it depended. It is a kind of compound gift; so many collateral circumstances are taken into it that nothing can be inferred from it; but being a draft on his goldsmith, that draft was delivered;" and Lord Loughborough, in Tate *v.* Hilbert,[4] says that the fact was indorsed on the bill, that the amount of the bill was to be applied to the payment of mourning, and that the case was

[1] Lawson *v.* Lawson, 1 P. Wms. 441; Bromley *v.* Brunton, L. R. 6 Eq. 275; Rolls *v.* Pearce, L. R. 5 Ch. D. 730.

[2] Lawson *v.* Lawson, 1 P. Wms. 441, 442.

[3] 2 Ves. 431, 441.

[4] 2 Ves. Jr. 111, 121.

rightly decided, "as, taking the whole bill together, it is an appointment of the money in the banker's hands." The learned Lord Chancellor fails to suggest how the fact that the amount of the bill was to be used in payment for mourning weeds makes any legal difference. If, however, Lord Loughborough's distinction be sound, Lawson *v.* Lawson confessedly must be supported on the ground of appointment, and not on the doctrine of *donatio mortis causa;* and if the distinction be not sound, the case was overruled by Lord Loughborough himself in Tate *v.* Hilbert.[1]

In Bromley *v.* Brunton,[2] a woman on her death bed gave her check upon her bankers for £200 to M. A. Bromley. The check was presented to the bankers twice before the maker's death, and payment refused because they doubted the authenticity of the donor's signature. On a bill for the administration of the trusts created by the will of the maker, Vice Chancellor Stuart allowed the amount of the check to the payee, on the ground that the gift was complete, saying: "I conceive that, under these circumstances, no further act was necessary on the part of the donor to make the gift complete. The failure, so far as the gift has failed through nonpayment to this time, occurred through the default of third parties."[3] And he distinguishes Tate *v.* Hilbert, *supra* (erroneously called Tate *v.* Leithead), on the ground that there the check had not been presented. But it is obvious that the attempt to procure payment is by no means the same as payment; and a failure in such an attempt leaves the party in the same position in which he was before.

In Rolls *v.* Pearce,[4] a man on his death bed drew two checks payable to his wife, who got them discounted by a banking firm before her husband died. They were presented to the drawees for payment after the maker's death, and payment was refused. The widow, having refunded what she had received on them, sought reimbursement from the executors. Vice Chancellor Malins supported her claim, on the ground that the gift was complete, and also on the sanction of a *dictum* by Lord Loughborough in Tate *v.* Hilbert,[5] to the effect that if the donee in such a case receives the amount of the check in any way and from any source, he can keep it, — an observation which clearly

[1] 2 Ves. Jr. 111.
[2] L. R. 6 Eq. 275.
[3] L. R. 6 Eq. 277.
[4] L. R. 5 Ch. D. 730.
[5] 2 Ves. Jr. 111, 118.

is not true. Obviously the last indorsee for value and without notice could have enforced the checks against the maker's estate, and the case can only be supported on the ground that the widow was such an indorsee, which would be impossible, and is wholly inconsistent with the reasoning of the opinion.

Of these two cases before the Vice Chancellors, it is sufficient to say that they are not consistent with the prior decision of Lord Romilly, Master of the Rolls, in Hewitt *v.* Kaye,[1] — which, being that of a superior tribunal, ought to have been binding upon the learned Vice Chancellors, — nor with the later cases of *In re* Beak [2] and *In re* Mead.[3] *

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[1] L. R. 6 Eq. 198. [2] L. R. 13 Eq. 489. [3] L. R. 15 Ch. D. 651.

* Bromley *v.* Brunton was decided in 1868, *In re* Beak in 1872, and Rolls *v.* Pearce in 1877.